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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 784

**CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE
OF WILLIAM L. DEVER, DECEASED,**

Petitioner,

vs.

**ST. LOUIS SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI
AND BRIEF IN SUPPORT THEREOF.**

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OF WILLIAM L. DEVER, DECEASED,

vs.

Petitioner,

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI

*To the Honorable Justices of the Supreme Court of the
United States:*

The above named petitioner respectfully petitions for a Writ of Certiorari to review a decision of the Supreme Court of Missouri (*Benton v. St. Louis-San Francisco Railroad Co.*, 182 S. W. 2d, 61), which decision reversed an order by the Circuit Court of Jackson County, Missouri, granting petitioner a new trial and directing said Circuit Court to reinstate the verdict of the jury and enter judgment for the respondent.

Summary Statement of the Matter Involved

This action was for the recovery of damages for injuries sustained by William L. Dever on July 14, 1932, while employed by the defendant in its Ft. Scott, Kansas yard as a switchman (R. 17). The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, Sec. 1 to 8, 35 Stat. 65, 45 U. S. C. A. 51-59). A verdict was rendered by the jury for the respondent (R. 11, 318). Petitioner filed a motion for new trial upon the grounds that the verdict was against the law and the evidence; that the court erred in the giving of each instruction to the jury, in excluding proper evidence, in admitting improper evidence, because the verdict was for the wrong party and because the verdict was against the greater weight of the evidence (R. 317, 324). Pending the filing of a motion for new trial and the ruling thereon, Dever died (R. 318) leaving a widow, Winnie Dever (R. 92), and the cause was revived in the name of petitioner (R. 319, 323). The motion for new trial was sustained December 17, 1942 (R. 324). The respondent appealed to the Supreme Court of Missouri (R. 325) which reversed the order of the trial court granting a new trial as aforesaid.

There was no dispute as to the applicability of the Federal Employers' Liability Act, it being admitted in open court that both Dever and respondent were engaged in interstate commerce at the time of decedent's injury (R. 110).

Decedent was injured while riding on the rear footboard of the tender of a switch engine (R. 18-23). When it was opposite a switch-stand the switch lever and ball swung upward, toward the track and decedent, struck him on the right ankle (R. 31) and injured him to such an extent that he was seriously and permanently disabled (R. 77, 78, 85, 86).

In the interest of brevity petitioner will not give a full statement of the facts as they will be fully set forth in his brief hereafter.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of Congress February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A. Title 28, Sec. 344), and more particularly Sec. 344 (b) thereof.

The judgment of reversal sought to be reviewed was rendered July 3, 1944 (R. 333). A motion for rehearing and to transfer to the court *en banc* was duly filed, entertained by the court, and denied September 5, 1944 (R. 338). An extension of time within which to file this petition for a Writ of Certiorari was allowed by this Court until December 26, 1944, and petitioner files his petition within such period of time, as extended (R. 341).

This action was based upon the laws of the United States, to wit: The Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1-8 inclusive, 35 Stat. 65, 45 U. S. C. A. Sec. 51-58).

The action of the Supreme Court of Missouri in this case, so far as we have been able to determine, is without precedent, either in the State of Missouri or in any other State. It is clear, however, that one entitled to the benefit of the Federal Employers' Liability Act cannot be deprived thereof by a decision of the Supreme Court of Missouri not reviewable by this Court, and petitioner claims a right and privilege secured to him by the Federal Employers' Liability Act which has been denied by the Supreme Court of the State of Missouri. The following cases, it is believed, sus-

tained the jurisdiction of this Court to issue its Writ of Certiorari:

- Osment v. Pitcairn*, 317 U. S. 587, 63 S. Ct. 21, 87 L. Ed. 481; 320 U. S. 792, 64 S. Ct. 206, 88 L. Ed. 120;
Brady v. Southern Railroad Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.
Tennant v. Peoria & P. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322;
Lilly v. Grand Trunk Western Railway Co., 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411;
Tiller v. A. C. L., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;
Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Owens v. Union Pacific Railroad Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

Finality of the State Court Judgment

There can be no question as to the finality of the judgment of the Supreme Court of Missouri as it left nothing to the discretion of the lower court except to enter the judgment prescribed by it and the cause was ripe for the issuance of a Writ of Certiorari by this Court as the appellate jurisdiction of the highest court of the State of Missouri was exhausted by the denial of petitioner's motion for rehearing or in the alternative to transfer to the Supreme Court of Missouri *en banc*:

- Mower v. Fletcher*, 114 U. S. 127, 5 S. Ct. 799, 29 L. Ed. 117;
Rio Grande Western Railway Co. v. Stringham, 239 U. S. 44, 47, 36 S. Ct. 5, 60 L. Ed. 136;
Board of Commissioners of Tippecanoe County v. Lucas, 93 U. S. 108, 113, 114, 23 L. Ed. 822.

Right of Petitioner to a Trial by Jury

Section 28, Article 2 of the Constitution of Missouri provides as follows:

“The right of trial by jury, as heretofore enjoyed, shall remain inviolate; And that in the trial by jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict.”

Petitioner therefore cannot be deprived of his right to a trial by jury in this action without his consent. *Kansas City v. Smith*, 238 Mo. 323, 141 S. W. 1103; *Hickox v. McKinley* 311 Mo. 234, 278 S. W. 671; *Minneapolis & St. Louis Railway Co. v. Bonbolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961; Ann. Cas. 1916 E 505, L. R. A. 1917 A 86.

Questions Presented

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act:

1. Does the *res ipsa loquitur* doctrine apply under the facts of this case?
2. May a State court deprive a plaintiff in a *res ipsa loquitur* case under the Federal Employers' Liability Act of the right to have a jury determine the credibility of the witnesses?
3. May a State court withhold from a jury in a Federal Employers' Liability Case where the facts are in dispute and the evidence in relation to them is such that fair-minded men might draw different inferences and conclusions therefrom?
4. May a State court distinguish between litigants in a Federal Employers' Liability Case by holding identical evidence and testimony believable and sufficient to support

a verdict in one case and unbelievable and insufficient to support a verdict in another case of similar or identical aspects?

5. Is the opinion of the court in this case in conflict with the opinion of the highest courts of appellate jurisdiction of other States in Federal Employers' Liability cases?

6. Does the opinion of the court in this case conflict with the opinions of the various circuit courts of appeals or of this Court in Federal Employers' Liability cases?

7. Does the opinion of the Supreme Court of Missouri in this case conflict with other opinions and decisions of the Supreme Court of Missouri in Federal Employers' Liability cases and thereby prevent a uniform application of the Act throughout the State of Missouri or the United States?

8. May a State court deprive a plaintiff of the right of a trial by jury in the guise of determining the sufficiency of the evidence for submission to a jury in a Federal Employers' Liability case by holding that the court could take judicial notice that the injuries received could not have been sustained in the manner shown by plaintiff's evidence or by a consideration of defendant's conflicting evidence?

9. Has plaintiff been unjustly denied the right to a trial by jury in this case?

10. May a State court deprive a plaintiff in a Federal Employers' Liability case of the right to have his evidence submitted to and determined by a jury upon the theory that the *res ipsa loquitur* doctrine cannot be relied upon because plaintiff's evidence as to what caused the injury is so contrary to physical facts as to be unbelievable?

Reasons Relied Upon for the Allowance of the Writ

1. The Supreme Court of Missouri has determined substantial rights of an employee arising under the Federal

Employers' Liability Act in a manner not in accord with the applicable decisions of this Court and has ruled upon a set of facts, in a manner that does violence to the construction of the Federal Employers' Liability Act as set out in the applicable decisions of this Court.

2. The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) provides that:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The act does not define negligence. Rights and obligations under it depend upon the applicable principles of the common law as interpreted and applied in Federal courts. *Missouri Pacific Railway Company v. Aeby*, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351. *Chesapeake & Ohio Railway Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

In the case of *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, this Court said:

"The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. * * * 'Negligence' is a word of broad significance and may not readily be defined with accuracy."

3. The *res ipsa loquitur* doctrine is applied in the courts of the United States in Federal Employers' Liability cases.

Minneapolis & St. Louis Railroad Company v. Gotchall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995; *Southern Railway Company v. Hattie Bennett*, 233 U. S. 80, 34 S. Ct. 566, 58 L. Ed. 80; *Pitcairn et al. v. Perry*, 122 Fed. 2d 881 (C. C. A. 8, 1941) Cert. den. 314 U. S. 697, 62 S. Ct. 414, 86 L. Ed. 315; *N., C. & St. L. Railway Company v. York*, 127 Fed. 2d 606 (C. C. A. 6, 1942); *Terminal Railway Company of St. Louis v. Staengel*, 122 Fed. 2d 271 l. c. 273 (C. C. A. 8, 1941); *Ecker v. Pettibone*, 110 Fed. 2d 451 (C. C. A. 7, 1940); *Chesapeake & Ohio Railway Company v. Vigor*, 101 Fed. 2d. 865 (C. C. A. 7, 1939) Cert. den. 307 U. S. 365, 59 S. Ct. 1031, 83 L. Ed. 1517.

5. The Federal Employers' Liability Act should have a uniform application throughout the State of Missouri and the decision of the Supreme Court of Missouri herein deprives one litigant of the right to a trial by jury upon the theory that the evidence is insufficient for the jury's consideration yet permits another litigant to submit his case to a jury under practically identical evidence, *Freeman v. Terminal Railway Association of St. Louis*, 341 Mo. 288, 107 S. W. 2d. 36.

6. The Supreme Court of Missouri has failed to follow the decisions of this court in weighing, applying and evaluating the evidence in a *res ipsa loquitur* case. *Gleeson v. Virginia Midland Railway Company*, 140 U. S. 435, 444, 11 S. Ct. 859, 862, 35 L. Ed. 458; *Terminal Railway Association of St. Louis v. Staengel*, 122 Fed. 2d 268 l. c. 274 (C. C. A. 8, 1941).

7. This court has never determined whether or not a verdict may be directed in a *res ipsa loquitur* case (*Terminal Railway Association of St. Louis v. Staengel*, 122 Fed. 2d 268 l. c. 274) and in view of the increasing complexity of industrial devices this question is in the fore-

front of developing tendencies in the construction of the Federal Employers' Liability Act; is of general and public interest in its application to cases involving proceedings in state courts and should be determined and settled by this court.

8. The Supreme Court of Missouri failed to apply the test that to justify directing a verdict the court must be compelled to the conclusion that reasonable minds cannot differ as to the insufficiency of the evidence prescribed by this court in the case of *Brady v. Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. Rep. 232.

9. There was no explanation in the evidence as to the cause of the casualty showing lack of negligence on the part of respondent and the opinion therefore conflicts with the case of *San Juan Light & Transit Company v. Requena*, 224 U. S. 89, 99, 32 S. Ct. 401, 56 L. Ed. 680, 684.

10. The holding of the Supreme Court of Missouri was based upon speculation and conjecture and reason not only not shown by the record but in conflict therewith.

11. The Supreme Court of Missouri denied the petitioner the right to have the jury determine the credibility of the witnesses.

12. The Supreme Court of Missouri denied the petitioner the right to a trial by jury.

13. The Supreme Court of Missouri by its opinion in the present case, has declared a principle of law which, if allowed to stand, will be dangerous and far reaching in its effect and so narrow the benefit extended by the Federal Employers' Liability Act as to practically prevent the application of the *res ipsa loquitur* doctrine in such cases and a substantial group of railway employees, entitled to re-

ceive the benefit of the act, will be wholly without a remedy because they are unable to explain the precise manner in which they were injured.

14. The decision of the Supreme Court of Missouri wholly destroys the *res ipsa loquitur* doctrine as applied to a Federal Employers' Liability case as that doctrine is inapplicable under the present decision unless the petitioner knew or could explain the cause of his injury and shift the burden of explanation from the railroad to the employee contrary to the holding of this court in the case of *San Juan Light & Transit Company v. Requena*, supra.

15. If the opinion in the present case is the law, it will open a field for numerous and widespread abuses, enabling railroads to furnish defective, not reasonably safe and dangerous instrumentality and places for their employees with impunity and it will constitute an authority for lower courts to take Federal Employers' Liability Cases from juries by deciding questions of fact and the credibility of witnesses themselves instead of submitting such cases to a jury thereby depriving an injured employee or the dependents of a deceased employee the right extended by the act.

Substantiality of the Questions Involved

A careful investigation of the questions decided by this court, the circuit courts of appeal and the highest state court construing. The Federal Employers' Liability Act reveals no instance in which an employee of an interstate railroad has been denied the benefit of the act in a *res ipsa loquitur* action because the court conceived he must have been injured in some other way than that in which the evidence disclosed, or that his evidence in such a case as to the manner in which he was injured was so unusual and extraordinary as to be contrary to physical facts and unbelievable.

This cause turned upon the effect to be given evidence. Federal questions therefore were the only ones to be decided, to wit:

The right of petitioner to a trial by jury, the right of petitioner to have the jury determine the credibility of the witnesses, and whether or not the evidence was sufficient to submit to a jury.

This requires an analysis and exposition of the facts and such acts for a decision. *Louisville & Nashville Railroad Company v. Nelson*, 218 U. S. 36, 39, 30 S. Ct. 676, 54 Law. Ed. 921, 47 L. R. A. (N. S.) 84. *C. G. W. Railroad Company v. Rambo*, 298 U. S. 99, 80 L. Ed. 1066, 56 S. Ct. 693.

Seaboard Airlines v. Duvall, 225 U. S. 477, 32 S. Ct. 790, 50 L. Ed. 1176.

This is also held by this court in the late case of *Brady v. Southern Railway Company*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189 l.c. 234 as follows to wit:

“There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers’ Liability cases, this question must be determined by this court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act’s authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. * * * But when a state’s jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. * * .”

Also the case of *Tennant v. Peoria & T. U. Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322 l.c. 410, where a Writ of Certiorari was granted because of

"important problems as to the petitioner's right to a jury determination of the issue of causation," which is the same reason for which this court granted its Writ of Certiorari in the case of *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 and in the case of *Owens v. Union Pacific Railroad Company*, 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

The precise questions which are of importance, herein submitted have not been decided by this court and it should therefore issue its Writ to settle the law in regard thereto as was done in the case of *Swinson v. Chicago, St. P. M. & O. Railroad Company*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

Prayer

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this court directed to the Supreme Court of the State of Missouri commanding that court to certify and send to this court for its review and determination on a day certain therein named a full and complete transcript of the records and proceedings in the case of *Carlton R. Benton, Administrator of the Estate of William L. Dever, deceased, respondent v. St. Louis-San Francisco Railroad Company, a corporation, appellant, #38601* to the end that this cause may be reviewed and determined by this court as provided for in the statutes of the United States and that said decree and judgment of the Supreme Court of the State of Missouri may be reversed by this honorable court and that petitioner be granted a new trial and for such other and further relief in the premises as to this honorable court may seem meet and just.

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